

SENATE SELECT COMMITTEE ON CALIFORNIA'S ROLE IN THE WORLD TRADE ORGANIZATION

Senator Tom Hayden, Chair

Informational Hearing

August 8, 2000
Sacramento, California

SENATOR TOM HAYDEN: ...committees. What we're expecting is to meet several times, depending on convenience of attendance, during the August period that we're in session. The purpose of that is to take testimony and to scope out the problems with the Legislature, the administration, and other interested parties. But the hearings are going to have to fit into a very, very difficult schedule. For instance, in the last two hours, the room for this hearing has changed two or three times. Now it's back to what it was. We're just going to wait a couple of minutes.

I want to ask the consultants, Ann Blackshaw and Michelle Yu, to join me, and representatives from the other Senate offices should also feel free during this phase of our hearings to sit on the dais in order to ask questions and follow the discussion.

I'm joined also by Senator Mountjoy. Welcome, Senator.

I see we have an agency secretary and other luminosities, deputy luminosities, in the room. I know how precious every second is this week so I don't want to delay, but I have a feeling that other members will be coming.

You're from Senator Johnston's office? Thank you.

Do you mind, Chris, if we go out of order to invite Secretary Nichols? Or Secretary Nichols, would you like to hear from the Business and Trade Secretary's Office first? It's just a question of whether you want to hear some of the scope of the issues.

All right. Let me begin with a statement, and I can ask Senator Mountjoy if he wants to add. Then we'll go immediately to our witnesses.

The purpose of this Select Committee is to undertake the first assessment of California Legislature's role and state role in the world of these international trade agreements, symbolized by the WTO and NAFTA. They constitute a kind of creeping, confusing revision of federalism in which the state governments, which pass laws, are subject to potential challenge from the WTO or from other sources outside of the country. And so the phrase "globalization without representation" takes on some concrete meaning here.

Under the WTO and NAFTA protocols, there is a specific reference to the need to consult with the states. However, it has not been spelled out and has not been challenged. It's not clear what consulting means. Is it a formal process with hearings? Is it a telephone call? Is it a letter from the U.S. Trade Representative? All those questions about what consultation is adequate come to mind.

"The implementing laws also require providing notice to states on matters," and I'm quoting from the language of the federal law, "will potentially have a direct impact on the states, as well as providing states an opportunity to submit, on a continuing basis, information and advice on such matters."

So there is in these agreements an advisory role sketched in and a consulting role, but there's no fleshing out of what the consulting consists of, nor is there a definition of what a state is. Is a state the governor? Is the state a single point of contact, a lead person? Is the state the state legislature? Is it an agency?

There's nothing that prevents the assertion of the Legislature's role. It's simply a fact that the Legislature has not taken up a role and these trade agreements are unfolding.

So what we're faced with is apparently a kind of consensus that is not necessarily required by law that states -- that is, us, the Legislature -- should channel

our input through a single office, which I believe is the Secretary of Business and Transportation's Office. He's the -- not the single point of light. What's the word we're looking for? The single point of contact. That's right. The Spock, the single point of contact.

But obviously, this affects the Legislature which passed the bills. For example, Mr. Mountjoy will never forget the years spent on the issue of MTBE.

Consultants for Members of the Senate, please come up because we may need you to ask questions.

On the MTBE issue, we finally agreed on legislation, on Executive Orders, and we phased it out for what we thought were good policy reasons. Then a multi-national corporation in Canada sued, saying that they were losing and that we owed them \$970 million, or the United States government owed them \$970 million, and that gets resolved in a negotiated panel discussion where the panelists are appointed from Canada and the United States and the third by the two countries. As far as I can tell, California doesn't have the usual role that you would have in dispute resolution of submitting your legal arguments, having a record to go on and to appeal from. Simply a decision is made. Then the federal government can ask us to drop the law, change the law, or the federal government could pay the \$970 million to the Canadian company.

We're not in that loop. We are not substantively represented, even though we passed those laws.

A second example, the State of Massachusetts is a test case of procurement law. A few weeks ago, the U.S. Supreme Court struck down a Massachusetts law that sought to avoid making contracts with oil companies or others that do business in Burma, not unlike the antiapartheid law that the California Legislature passed in the '80s.

The Clinton Administration was an amicus supporting the challenge to the Massachusetts law. It was closely watched by all the parties. It was a group of corporations associated with the WTO against the State of Massachusetts.

The result was a decision which the Supreme Court ruled that the Massachusetts law had to be struck down on relatively narrow grounds that leave the question open in the future. The grounds were essentially that, since the federal government had acted to come up with sanctions of its own regarding Burma, the federal government pre-empted the states with respect to that issue. That means, if the federal government has acted and put its clout behind some pro-human rights position, states like California would not be allowed to put our considerable procurement power to work. We would be pre-empted.

SENATOR RICHARD MOUNTJOY: Generally, though, the federal government, even if they do that, if our laws are more restrictive, it's okay. It's just that we can't reduce. So how did that court find--

SENATOR HAYDEN: I think my good counsel, Michelle Yu, can clarify for me, if she wishes, but that we won't be able to do. We can't act if the federal government has acted, even if the federal government's action is less than our action.

SENATOR MOUNTJOY: It's a total preemption.

SENATOR HAYDEN: Preemption of the field if the federal government has acted.

I've asked Dr. Robert Stumberg at Georgetown School of Law to be a cross-continent advisor to this committee and he's agreed. He's got some foundation funding. For the past several years, he's done fascinating studies of the effect of these trade agreements on California laws. His current analysis, which is contained in your binder, identifies 95 laws that are State of California laws that would be subject to a challenge by WTO or NAFTA standards.

So we're talking about some things that are actual, like the MTBE case, and we're talking about some things that are extensively across many jurisdictional lines:

food quality, food safety, pesticide laws, procurement preferences, you name it; 95 laws.

So the purpose of this committee is to explore and try to define a role for the California Legislature in this process, which I think would make a healthier balance of democracy and trade instead of trade overwhelming democracy. And we would want to develop proposals for introduction in January 2001 based on these hearings.

In August I plan to call these hearings as necessary to obtain testimony, particularly from administration's representatives or agencies. We also will be watching closely to see if the Assembly passes the SCR which would create a joint legislative committee to succeed this one after its expiration November 30th. I also have a couple of bills on process that are in the Assembly that would require agency heads to advise the Legislature when trade protocols or trade agreements or initiatives are coming that might affect California laws.

I don't have a specific wish list, but we might ask the Senate Office of Research, and the State Library, and the Georgetown Law School to provide us with more research to help understand the kind of issues that are before us.

After that, when we're out of session August 31st, I plan at least two public hearings on the broader issues, including an invitation to the U.S. Trade Representative, Charlene Barshefsky, or a visit to Washington to her office, and also a visit to the WTO headquarters in Europe to make sure they understand that California is more than a spot on the map, and to dialogue with them about what they think the role of the states ought to be.

In November, I hope that the committee will prepare a draft report for 2001 that would at least look at issues like how to maintain permanent legislative oversight, whether to reform our existing agencies, like the World Trade Commission, that were formed before the WTO issues came about, how best to identify our state trade rep as a public, accountable, clearinghouse kind of person or persons, and how to involve

constituencies that are affected -- business, labor, agriculture, environmentalists, and so on -- in some kind of civic oversight council or mechanism.

These are all achievable objectives, and the Chair is fluid and open to additional suggestions as we move along.

Now, I would like to just ask those who are here, who have busy schedules, if there's any particular order that you wish to follow again. Otherwise, I'm going to ask our Deputy Secretary for International Trade and Investment, Chris Compana, to come up. If that's all right, Steve, Mary? All right.

We had a meeting on January 10th of this year in your office with the Secretary, and with Mr. Stumberg piped in from Washington, and your secretary agreed to follow up on how best to involve the Legislature and make this a more open, accountable process.

We welcome you and hope to hear some suggestions along those lines.

MR. CHRIS COMPANA: Well, thank you very much, Mr. Chairman, Members of the committee, and legislative staff. It's a great opportunity for the Trade and Commerce Agency to participate in this afternoon's hearing.

First of all, I just wanted to say that I know Secretary Hatamiya was trying to attend this hearing. He had a family emergency in Washington, D.C., which will keep him out of the office for the rest of this week. But I do want to address and just follow on your comments that prefaced the opening of the hearing. I think my initial comments at least will cover some of those questions and the issues that the Chairman raised with regard to California and the WTO, and USTR, and many issues regarding trade and the development of business opportunities overseas and the role of the Legislature, on the role of the executive as well.

Let me just begin by saying that for the State of California, international trade has become one of the driving forces in the economy. International trade now accounts for 25 percent of California's gross domestic product and also employs 2.6

million Californians. We are the number one exporting state in the nation and we export more than 20 percent of all the nation's goods and services.

In addition, California's economy is driven by information technology, electronics, and computer-related products, health care technology, entertainment, aerospace, manufacturing, agriculture, as well as other sectors, and California is clearly taking its place as a global leader for international trade development.

I think the progress being made by the World Trade Organization, and under such trade agreements as NAFTA, to lower tariffs, reduce trade barriers, strengthen trade adherence mechanisms, has also assisted California by providing our workers and our companies with a fairer playing field around the world.

While we believe there's still work to do, certainly, in opening up markets for services and agriculture, in protecting intellectual property rights for the entertainment industry, for the software industry, and for setting standards for e-commerce, among others, for California international trade means rising wages, job creation, and a better quality of life for our workers and citizens.

And I think it's important to mention here today that it has been documented in a number of studies that international trade jobs pay an average of 15 percent higher than those not related to trade. In California's information--

SENATOR HAYDEN: What's the definition of an international trade job?

MR. COMPANA: A job related to the export of goods or services for a California product or service; or, on the investment side, a job that is created by a foreign operation, a foreign company, that establishes an operation here in California and that employs individuals. And that average is really not per job, but companies in general that are involved in international trade have been shown to have a higher average wage by at least 15 percent.

Let me just finish that thought because one of California's really, one of its driving economic sectors at present, is the technology and the knowledge economy

here. So when you combine high-tech jobs and international trade jobs, and coupled by the fact that it is the fastest growing job sector in California that is technology-related jobs, I think we have an industry here, again, that is tied to 25 percent of the GDP that is related to international trade.

SENATOR HAYDEN: Can you provide us, Chris, with those studies?

MR. COMPANA: Sure. Yes, I can make sure that the committee gets those this week.

SENATOR HAYDEN: So you reject the – I'm sorry. Go ahead.

MR. COMPANA: Let me talk about the United States Congress and the vote to grant China permanent and normal relations status. We think at the Trade and Commerce Agency, it is an extremely positive trade development. We think that engaging China, California, the U.S., and other global economies will gain greater access to its market in many of the sectors I just mentioned, while at the same time give our companies -- or allow our companies to continue to work on the ground in China that will continue to influence the workplace standards, whether it's in China or other markets.

I think this is an important point when we start to talk about how California and how the U.S. can create transparency and can engage countries to bring about change.

As our companies abide by the same standards required in the U.S., change will take place in China as it has in other world markets. Similarly, we view NAFTA as a free trade agreement that has significantly opened the Mexican and Canadian markets to California products and is increasing efficiencies in each of our economies.

Just for some perspective, in 1997, Mexico catapulted past Canada to rank as the state's second largest export market. Two years later, in 1999, Mexico surpassed Japan as California's largest export market. And in the first six years of NAFTA, California exports to Mexico have increased by 150 percent to almost \$16 billion in 1999.

Today, California exports to Mexico, directly and indirectly, support nearly 200,000 jobs in the Golden State, with 95,000 of these jobs resulting from export growth under NAFTA.

And just to clarify again the Chairman's question regarding trade and whether a job is directly or indirectly tied, we define that by if a company is exporting a product that's going abroad -- certainly that falls into the international trade category -- but for companies that are in the transportation environment as well, we would consider that indirectly related to the international trade process.

Let me just spend a couple of minutes addressing the Chairman's question about the role of the executive and the Trade and Commerce Agency in working with the USTR. I'd also like to talk about generally the legislative process and put forth some ideas about how we might work more closely together.

Under the current law, the U.S. government was required to establish a formal, as the Chairman said, state point of contact in the executive branch of each of the 50 state governments; and as such, the USTR has established a close working relationship with the California Trade and Commerce Agency.

SENATOR HAYDEN: Does that mean that Governor Davis appoints your Secretary to be the point of contact? Does the governor of the state appoint the person who's the point person?

MR. COMPANA: Yes, the Governor's Office does, yes.

SENATOR HAYDEN: Okay. Would that be true in every state?

MR. COMPANA: I believe it's up to the USTR to engage the governor's office in each of the states, and then it's up to each of the governors' offices to either establish itself as a point position or one of the agencies.

SENATOR HAYDEN: Do you have a written appointment from Governor Davis confirmed by the U.S. Trade Representative?

MR. COMPANA: I don't believe so.

SENATOR HAYDEN: Okay. Go ahead.

MR. COMPANA: The California Trade and Commerce Agency, therefore, maintains day-to-day contact or week-to-week contact with the Office of Intergovernmental Affairs of the USTR; and as issues arise, we do exchange information, both our questions and their answers and their relevant issues coming our way.

And I should say this contact--

SENATOR HAYDEN: Who maintains the day-to-day contact?

MR. COMPANA: On our side?

SENATOR HAYDEN: Yes.

MR. COMPANA: That would be me and the people in my office, and the Office of International Trade and Development.

SENATOR HAYDEN: Okay. Thanks.

MR. COMPANA: In addition to our ongoing contact, the Governor's Office and others in his office and in the agency have sort of an informal, regular contact with USTR. And as you said, while the point of contact really is the conduit used by the USTR -- that has, in our case, been used to seek public comment from California businesses on issues ranging from whether it's European beef import quotas or establishing universal accounting standard for global businesses -- we have that dialogue and they do use us to seek public comment, and then we are required to move into contact and to get into contact with other affected organizations or companies.

And we've also had ongoing interaction with the USTR in the area of the MTBE issue, which was mentioned by Senator Mountjoy.

Just expanding further on the vehicles, on the infrastructure that's available to the Legislature, the USTR also has a strong relationship with the National Conference

on State Legislatures, as well as the Intergovernmental Policy Advisory Committee, which is made up of U.S., local, and state-elected officials. And each of these organizations have frequent contact with the Trade Rep's office in coordinating trade matters. I know that IGPAC has issued recommendations in the past on a regular basis to the USTR and also their recommendations to federal cabinet officials about trade policy.

As some of you may know, in June '99, Secretary Hatamiya did participate in the USTR's public hearings in Los Angeles that were held in advance of the WTO ministerial meeting in Seattle. This year, Secretary Hatamiya and Senator Hayden traveled to Seattle, separately; the site of the WTO ministerial meetings. This meeting provided--

SENATOR HAYDEN: How did it go for the Secretary?

MR. COMPANA: Excuse me?

SENATOR HAYDEN: How did those hearings go for the Secretary?

MR. COMPANA: I think they went very well.

SENATOR HAYDEN: Was there an outcome?

MR. COMPANA: I think most of the work that is completed, leading up to the WTO ministerial, is really the core of the work product. I think the ministerial meetings have -- while they are substantive, I think the core of the meetings, or the core of the substance is really done leading up to that point.

I would say that the ministerial gave each of them, both Secretary Hatamiya and Senator Hayden, an opportunity to demonstrate the views that were important to each individual in Seattle.

Let me just offer a couple of suggestions how we might, at the Trade and Commerce Agency, be more interactive with the Legislature, because I think the Chairman does raise an excellent point about some of these issues being undefined and other issues being left to debate and to discussion about how the Trade and Commerce Agency or how this point of contact would interact with the Legislature.

And I would suggest that one way to further open the dialogue is to begin to conduct regular informal legislative briefings on trade matters that the Chairman or that the committee and the other trade committees is interested in, and at the same time raise issues that come from not only the USTR but from other federal agencies such as the Department of Commerce so that there can be that ongoing dialogue for discussing issues.

And let me just say in closing, Mr. Chairman, California's economy and by its extension, really, its businesses, workers, families, are increasingly being drawn into the international trade community. The Agency is dedicated to developing business opportunities at home and abroad for our companies, and we will continue to advocate their cause. We look forward to working with all of the Members of this committee in sharing and receiving information that will be strengthening California's role in the global economy.

Thank you.

SENATOR HAYDEN: Excellent. Thank you very much, and if you want to submit that written testimony, we'd be glad to take it.

Let me, for purposes of time, just try to ask you some questions rather than engaging in debate.

On this issue of the positive benefits of trade, I think that the committee will have other hearings on that question. My sense of your testimony from your agency is that you've offered no suggestion in your testimony of any downside, and we'll note that and not debate it. But you're aware that there is debate in the world about the downside as well as the positive aspects of trade.

The purpose of the committee is to maybe give an opportunity for all those views to be brought forth, but we have to keep coming back to the issue of the role of the Legislature. So let me go to that.

On the China vote, before I go on, you say it allows California companies to work on the ground in ways that will promote workers' rights, and that we'll get the Chinese to abide by our standards. If you could submit to the committee in writing how exactly your agency will get California companies to express our standards, we would appreciate that.

I can give you, for instance, for your reference, the article by Rob Collier in the *Bay Area Press* a few months ago that showed a U.S. Chamber of Commerce publication in China that was urging Chinese management to lower their wages still further so as to increase the U.S. and California investment. As you know, there are people who think that we're propping up dictatorial work conditions.

So I'd be very interested in what your agency may do or has done that would indicate an effort to get the Chinese management to abide by our standards.

Also on the NAFTA issue, this may be something that we'll ask SOR, I don't know, but if you could supply us with a more balanced pro and con analysis of what sectors of the California economy have gained and what, if any, sectors have lost, and the same for the Mexican economy. Has NAFTA displaced people? Do they become immigrants to Los Angeles? and so on. There may be existing materials you have or articles.

MR. COMPANA: I can get for the Chairman.

SENATOR HAYDEN: On the role of the Trade and Commerce Agency, you said that you and your office -- how big is your office, Chris? How many staff?

MR. COMPANA: In the division, International Trade?

SENATOR HAYDEN: Office of International Trade and Development.

MR. COMPANA: Ninety.

SENATOR HAYDEN: And you're on a day-to-day basis with the U.S. Trade Representative's Office of Intergovernmental Affairs? Is that by phone?

MR. COMPANA: It's by phone, by e-mail, by fax. I would like to say that day-to-day, everyday. No--

SENATOR HAYDEN: You said day-to-day, week-to-week.

MR. COMPANA: Right.

SENATOR HAYDEN: Are those written records available to the Legislature as it might pertain to any laws that the Legislature has passed?

MR. COMPANA: I don't know. I'd have to check the record, or I'd have to check their availability. I mean, I'm not saying they're not, I just don't know.

SENATOR HAYDEN: All right.

You said that you seek public comment from California businesses. What's the public version of the comment? Therefore, are there comments that you have that we could see from California businesses about particular trade proposals?

MR. COMPANA: Yeah. Let me clarify the process, and that is that, for example, on the import quotas that the EU imposed on beef, they'll contact my office and seek opinions or input from California companies that are affected. We will send out requests for information or for statements or concerns by California companies, and I'll check to see what level of response we did get and who those did go out to initially.

SENATOR HAYDEN: And would that be part of the public record available to us?

MR. COMPANA: I believe so.

SENATOR HAYDEN: All right.

Do you limit yourself to seeking public comment from California companies as opposed to labor or non-governmental organizations because that's your natural agency constituency? Or do you think there's a need to seek public comment from other representatives of California than businesses?

MR. COMPANA: Well, our primary clients are California businesses and that is who we, on a regular basis, interact with, so that is the reason why we sought their input.

SENATOR HAYDEN: Do you consult with the Department of Industrial Relations on the impact of trade agreements on the California economy?

MR. COMPANA: Not on a regular basis.

SENATOR HAYDEN: Do you consult with the Secretary of EPA on the impacts of trade agreements on the California economy?

MR. COMPANA: We have had more interaction on that front, particularly with regard to the MTBE issue.

SENATOR HAYDEN: How about the Secretary of Resources?

MR. COMPANA: I'd have to check that, but not to my knowledge.

SENATOR HAYDEN: Any other state agencies that you have an institutional consulting relationship with?

MR. COMPANA: Actually, let me check that comment on the Resources because the California Energy Commission is part of the Resources Agency. We do have regular interaction with them. In fact, we're working on a memorandum of understanding with the Energy Commission. And also, we have worked on a regular basis with Business, Transportation, and Housing Agency, whether it's regarding issues that develop on the borders.

SENATOR HAYDEN: What's the MOU concerning with the Energy Commission?

MR. COMPANA: It's concerning joint participation in business development activities, the exporting of energy and environmental technologies to international companies.

SENATOR HAYDEN: And would that be reported to the Legislature or appear in any of the budget or other materials that we have?

MR. COMPANA: The MOU? Or the successes as a result of--

SENATOR HAYDEN: The MOU.

MR. COMPANA: I'm not sure what the process would be to make it available. I mean, obviously it could make it available upon request once that MOU is signed.

SENATOR HAYDEN: All right. Could we see that MOU?

MR. COMPANA: Once it's signed, I don't think it's a problem.

SENATOR HAYDEN: But before, when it's in draft form?

MR. COMPANA: Well, it seems to me that it's not relevant until it is signed, that it would be a public document.

SENATOR HAYDEN: All right.

You said you had a relationship with Business, Transportation, and Housing. What's that? What's that about?

MR. COMPANA: Our interaction with BT&H has been generally regarding the transportation issues along the California–Mexico border. The Office of California–Mexico Affairs that is in San Diego and, as you know, the Board of Governors' Conference, which includes the four U.S. states and six Mexican states as members, work on several issues regarding transportation, border crossings, environmental issues, pollution–related issues.

SENATOR HAYDEN: You testified that you're required to contact other affected organizations. Would those be business and commerce, or could they be environmental or health? What's the scope of that mandate?

MR. COMPANA: I'm not sure which mandate you're referring to.

SENATOR HAYDEN: You said you're required to contact other affected organizations. I just wanted a definition of the affected organizations.

MR. COMPANA: I, at this point, don't have a definition of every organization that we would reach out to. I can tell you what our practice is, and that is to, again, as I said. report to -- it's mainly been affected business for which we're seeking comment.

SENATOR HAYDEN: On the June '99 hearings in Los Angeles before Seattle, the Secretary testified. Was the testimony made available to the Legislature?

MR. COMPANA: It was made available to the public, yes, at the hearings. I don't know if a copy was sent to the Legislature.

SENATOR HAYDEN: Could you send one now?

MR. COMPANA: Sure.

SENATOR HAYDEN: I'm not going to rise to your bait on the question of our both having the opportunity to demonstrate our views, but I believe it's easier inside a room than inside of a pepper-spray fog to demonstrate one's views. But I would like to know what the Secretary's views were and who they represented. We can take a look at those June 1999 hearings.

Now, on the last point about regular informal briefings, have you had any before? Have you had regular informal briefings with the Legislature?

MR. COMPANA: No, we have not.

SENATOR HAYDEN: Why is that?

MR. COMPANA: We have not been asked by the Legislature to hold those. We are very open to doing that.

SENATOR HAYDEN: Now, let me go just to a couple other questions that are kind of the heart of this Select Committee's agenda.

On your understanding that you have to consult with the states, what does that mean to you?

I get from your testimony consultation with the states is informal day-to-day or week-to-week consultation with the U.S. Trade Representative in your office. And additionally your consultation with affected business constituencies. Is that fair?

MR. COMPANA: The Trade and Commerce Agency's interaction with USTR is gauged and driven by the business issues that we believe affect California companies, and it's also driven by the USTR raising issues that may affect California companies. The extent of our relationship with the USTR is based on how many issues and how often these issues do arise.

SENATOR HAYDEN: But we had a meeting on January 10th in your office to discuss consultation with the Legislature and how the Legislature has been arbitrarily left out of the definition of the state. And it's my understanding from the notes that we took at the meeting that your Secretary thought that was a good idea and was going to follow up. That was a two-hour meeting.

There's been no follow-up. There's been no effort from January 10th till August 8th to follow up. So I'm left with the question of whether the Legislature matters in this consultation process. I need evidence from your office that indicates some effort to consult with the Legislature in the last seven months.

MR. COMPANA: Well, I think the opportunity is here today, and I think that we are going to require engagement by the Chairman and by the committee.

SENATOR HAYDEN: All right.

Does your Secretary meet formally in Washington with Barshefsky, the person in charge of U.S. Trade Office?

MR. COMPANA: To my knowledge, the Secretary has not met with the USTR herself, but he has met with her deputies in D.C. and has talked to them on the phone as well.

SENATOR HAYDEN: Do you know, to the best of your knowledge, if the Governor has on behalf of California export or economic policy met with Charlene Barshefsky?

MR. COMPANA: I'm not sure.

SENATOR HAYDEN: So it might be that California's never had a representative meet with the U.S. Trade Representative in a face-to-face meeting. Not once about California trade issues.

MR. COMPANA: It may be.

SENATOR HAYDEN: Do you think it would be a good idea to regularize face-to-face meetings since California is the eighth largest economic power in the world? Or do you think the informal back-and-forth activity is sufficient?

MR. COMPANA: I think it's up to Secretary Hatamiya, and I think it's up to the Governor's Office to make that determination. Certainly, I am involved in this process, but I would leave that to the Secretary.

SENATOR HAYDEN: Do you know if Secretary Hatamiya, or anyone on behalf of the State of California, ever contacted the U.S. Trade Representative with regard to the Massachusetts law?

MR. COMPANA: I'm not aware of whether he contacted the USTR or not.

SENATOR HAYDEN: Do you know if the Secretary has a position or took a position on the Massachusetts law?

MR. COMPANA: No, I don't.

SENATOR HAYDEN: Do you know that the Attorney General took a position on behalf of the state?

MR. COMPANA: No, I didn't.

SENATOR HAYDEN: So you never consulted with the Attorney General's office.

MR. COMPANA: I did not.

SENATOR HAYDEN: I mean your office never consulted with the Attorney General.

MR. COMPANA: My office did not.

SENATOR HAYDEN: As far as you know.

And finally, just one other thing. When you talk to these economic groupings that are your constituency, does it include the -- have you had meetings with the apparel industry regarding the phase-out of quotas? Do you know?

MR. COMPANA: No, I don't believe we have.

SENATOR HAYDEN: Have you had any meetings with the organic farming industry about the WTO Codex?

MR. COMPANA: Yes, I believe we have.

SENATOR HAYDEN: Can you give us some communication about what was discussed and what initiatives, if any, came out of those meetings to protect the state's organic community?

How about the fishing industry? Have you had meetings with the fishing industry?

MR. COMPANA: I don't believe we have.

SENATOR HAYDEN: How about Prop. 65? Have you had meetings about Prop. 65?

MR. COMPANA: Yes, we have.

SENATOR HAYDEN: And those would be with--?

MR. COMPANA: I don't know who they've been with, but I know there have been meetings with the Trade and Commerce Agency and different organizations.

SENATOR HAYDEN: How about between the Trade and Commerce Organization and the U.S. Trade Representative?

MR. COMPANA: I can't answer that. I'm not sure.

SENATOR HAYDEN: Well, do you think if there's a law like Prop. 65, which in this case was passed by the vote of the people, that's been challenged by the European community, the U.S. Trade Representative should hear from the California point-of-contact person?

MR. COMPANA: I think that would probably be a good idea.

SENATOR HAYDEN: Do you think the proponents of Prop. 65 should be alerted, as we move along, in a case where a challenge comes up they might not know?

MR. COMPANA: Probably wouldn't hurt.

SENATOR HAYDEN: Were there meetings with California businesses who are concerned about adverse effects of Prop. 65 on doing business?

MR. COMPANA: I don't have the details of the meetings that were held.

SENATOR HAYDEN: Could you get us who was in the meetings?

MR. COMPANA: Sure.

SENATOR HAYDEN: All right.

And clean air standards. Have you had meetings on clean air standards?

MR. COMPANA: I have not.

SENATOR HAYDEN: No, I mean, do you know if your agency has had meetings on clean air standards?

MR. COMPANA: I do not know.

SENATOR HAYDEN: All right. Thank you.

MR. COMPANA: Thank you very much, Mr. Chairman. It's a pleasure to be in front of you today. And I would like to say that I look forward to working with you and the other Members.

SENATOR HAYDEN: It would be very valuable if we can get quick answers in writing to some of the questions. I'd love to go on but we have so many witnesses. Unless somebody else has a comment or question, we'll just move forward.

Senator Alarcón, thank you for coming.

All right, next witness. Again, Mr. Smith, Madam Secretary, it's up to you. Which of you? She's fine. The Secretary of Resources is sitting quietly in the second row, and she's fine. How's the environment out there?

MR. STEPHEN SMITH: Apparently fine in the second row.

SENATOR HAYDEN: Yes. Thank you for coming.

MR. SMITH: Good afternoon.

SENATOR HAYDEN: Point well taken, our process needs some improvement.

Mr. Smith, do you have any written testimony or comments that you'd like to--

MR. SMITH: No. I just have notes. I can certainly put it in writing at some point and--

SENATOR HAYDEN: Well, go ahead. Do you have some opening comments?

MR. SMITH: Yes, just a couple of opening comments.

SENATOR HAYDEN: You are--?

MR. SMITH: Steve Smith, from the Department of Industrial Relations.

SENATOR HAYDEN: Very good.

MR. SMITH: First of all, thank you for the invitation to testify on this issue today. Let me just sort of paint some of the basics here for about two seconds.

We have 34 million Californians, 16 million of which work. Five hundred thousand of those employment opportunity jobs were created in the last year, which is a significant sort of bump on the charts.

SENATOR HAYDEN: I'm sorry, that number?

MR. SMITH: Five hundred thousand new jobs in the last year, which is a significant uptick.

The other most compelling fact about California's particular workforce, it is the most culturally diverse workforce, certainly in this country and probably anywhere in the world, in terms of just different kinds of people doing different kinds of jobs.

DIR's role in that has really, if you will, been extraordinarily domestic in terms of the purposes of this hearing. We have not heretofore engaged in, if you will, issues of international relations. We enforce the labor law in the state, enforce the health and safety laws in the state, regulate and promote apprenticeship in the state. It's really been here, and we have had, for all intents and purposes, virtually no international aspect to the Department

That being said, let me make a couple of basic points relative to WTO, NAFTA, all of that.

There have been, as I'm sure you all know, countless studies of the impact of NAFTA on our domestic labor situation. I think without attempting to sound too cynical, most of those studies seem at least to some degree driven by whatever the person believed going into the study. And so you have fairly diverse outcomes of folks studying the same kind of thing.

One thing is very clear. There have been very real winners and very real losers on both sides of all the borders in terms of economic benefits and economic losses in terms of individual workers and individual companies. Overall, I don't think the picture is absolutely clear. There is a consensus that, in fact, folks involved in (quote/unquote) "foreign trade jobs" do make a higher salary. The generally accepted figure is about 15 percent. It's sort of scattered through several of the studies.

There is no doubt that the NAFTA side agreement on labor is, in fact, the biggest sort of labor cooperation program between this country and any other foreign entity anywhere. There is a considerable body of thought that that agreement is under-whelming in terms of its enforceability because some of the enforcement provisions are difficult or virtually non-existent.

It is absolutely true, and this is sort of from a pure DIR perspective, that as neighboring countries strengthen their enforcement of health and safety laws, strengthen their enforcement of labor laws, our job enforcing ours becomes significantly easier because there isn't the dislocation and because it's not such an incentive for a company who's being told you have to obey the law, just simply to avoid the law completely by going over the border.

There are fairly strong preliminary indications, at least from the Mexico side of the border, that the NAFTA agreement has, in fact, improved their enforcement capability. Their budgets, for instance, for labor law enforcement have tripled since NAFTA went into effect. Now, is it a direct result or is there something else operating

in the Mexican economy that's driving that? I can't tell you that. But that is a very significant increase in a relatively short period of time

As that gets better, as their enforcement gets better, ours becomes easier to do.

The last thing I would say is that without a doubt, the most important asset we have in the international trade world is, in fact, our workforce. The very cultural diversity of our workforce is a tremendous asset to us in international trade. It is our jobs, and we should be doing everything we can do to make sure that workforce is as educated, is as trained, is as technologically current, because, in fact, the bottom line is, if they aren't we will lose jobs. Because the more the borders open up and the more all capital becomes flowable, either our workforce keeps up or they don't. And so we have a huge incentive to do infrastructure kind of things in terms of training and education.

Questions?

SENATOR HAYDEN: Thank you.

Again, you know, you're inviting a very interesting debate about the pros and cons of the trade agreements, and you've said there are winners and losers, which is somewhat different than the earlier testimony. I'm reluctant to engage in that issue, not because I don't have an opinion or two but because I want to return to this role of the Legislature.

You're the director of Industrial Relations. How do you interface with the U.S. Office of Trade Representative?

MR. SMITH: We don't.

SENATOR HAYDEN: Before today, or before my letters to you, did you know that under WTO and NAFTA the implementing laws by the U.S. government required consultation with the states?

MR. SMITH: I knew they required consultations by the states. I didn't know where that was in California.

SENATOR HAYDEN: So you didn't know who was California as in the designated person.

MR. SMITH: Right. I frankly assumed it was somebody in the Governor's Office.

SENATOR HAYDEN: Okay.

Do you think that it's important in any way for the person in charge of labor relations in California to interface in trade discussions that will affect California labor standards?

MR. SMITH: It certainly would be if any of the agreements, in fact, were going to impact on either our health and safety laws, our labor enforcement laws. I mean, there are in your appendix, I think, it's two OSHA laws and three wage-an-hour laws that are at least raised as issues.

SENATOR HAYDEN: Exactly.

MR. SMITH: I can tell you that as a Department, we've never run into any issue in the state that that got in the way. In fact, it's sort of interesting. In the last couple of years, we've had several calls at the sort of informal consultive level with the government of Mexico. As they sort of have more money to do this and beef up their enforcement, they're sort of looking for advice on the best ways to do it. But that's the extent of my contact.

SENATOR HAYDEN: Let me ask you about the U.S.-Mexican trucking issue. Is your agency involved in representing California's interests in that dispute?

MR. SMITH: No.

SENATOR HAYDEN: Have you been consulted by any state agency about California's role?

MR. SMITH: I believe -- I couldn't swear to this -- but I believe in the very early days of the Administration, like the first three months, over a year ago. I believe so.

SENATOR HAYDEN: This is one of the issues that pops up in the Legislature because it affects certain constituencies. Many of these other things seem like hazy potential threats on the horizon. But this one, you know, let me just review just a couple of things about it.

Mexico's filed a case against California, and it's about the issue that you mentioned: working conditions. California has the highest standards of the three NAFTA countries. California alone is higher than the U.S., Canada, or Mexico. Truckers in the U.S. are limited to ten hours driving time; Canadians are limited to 13; Mexican law, there's no limit. They can be paid as little as \$7 a day. Only our standards require random drug testing. Mexican trucks are not required to have front-wheel brakes. In the U.S. and Canada, they're mandatory. The gross vehicle transportation weight limit for Mexican trucks is 170,000 pounds; in Canada it's 137,000 pounds; in the U.S. it's 80,000 pounds.

Those are all significant variations that under NAFTA are to be harmonized. The question is whether they're harmonized upward or downward. Maybe they're not working class issues. Maybe they're not labor issues. But you're telling me that your agency doesn't have a role on the organizational chart to even commenting on those issues.

MR. SMITH: In the early days of the Administration, there were a couple of meetings that we participated in on that issue.

SENATOR HAYDEN: But those are voluntary meetings. Somebody calls you and says come to a meeting?

MR. SMITH: Yeah.

SENATOR HAYDEN: You don't have a mandated role.

MR. SMITH: Precisely. It was a situation where we got a call saying, "Do you have thoughts about this? Can you send some..." you know.

SENATOR HAYDEN: Right.

UNIDENTIFIED: [Inaudible]

SENATOR HAYDEN: Those are competitive issues. And you're right, I'm not going to go through them, but you're right in citing -- thank you very much for reading our print out of the 95 California laws. There are occupational health and safety laws as well, worker right-to-know laws and so on.

I'd like to just simply ask you if you'd join us, the committee, in trying to carve out what you think is an appropriate role for the Department of Industrial Relations in reporting to the Legislature and to your affected constituencies, who I presume are trade unions and organizations of working people--

MR. SMITH: We do spend some time talking to those folks.

SENATOR HAYDEN: Yes. But your thoughts before we're done on how ... (tape turned) ... Mr. Smith, on the labor issues.

MR. SMITH: Thanks.

SENATOR HAYDEN: All right, thank you.

Secretary -- I'm sorry. Mr. Alarcón.

SENATOR RICHARD ALARCÓN: Beyond the well-known trucking issues, are there any other agreements?

MR. SMITH: The ones that we have had some sort of internal conversations that haven't gone outside, they've just been sort of -- it's not so much the labor law enforcement but the health and safety issues have -- because a lot of that happens right along the border. So the Health and Safety Enforcement staff, we've wondered about, we speculate about. We really haven't engaged in it but that would be the next area that I'd probably go to in terms of some serious concerns.

SENATOR ALARCÓN: Have there been any economic impact studies, or is anybody monitoring the economic impact?

MR. SMITH: In terms of jobs and dislocation? There frankly have been probably dozens of studies. I would not attempt to be an expert on what -- but they say a variety of things. I mean, they're all over the map.

SENATOR ALARCÓN: Any that the state is doing?

MR. SMITH: Certainly not in my Department. I am not aware of any that the state is actually sponsoring, although my guess is somewhere in the UC system there are probably several.

SENATOR HAYDEN: Just a couple of things. We might want to have an informative hearing on the border to look at this NAFTA issue and hear more expert testimony.

I just had one other question. You remember last year, there was a big photo in the state's newspapers of a woman in Southeast Asia who was making 20 cents an hour, making athletic caps for the University of California with the Cal.

MR. SMITH: I don't remember the picture but I certainly know the issue.

SENATOR HAYDEN: She was sewing "Cal" into the caps that our--

MR. SMITH: That's a photo op.

SENATOR HAYDEN: --upper/middle-class students wear. The University signed off on a Code of Conduct involving better labor standards for those that they contract with to manufacture Cal stuff and T-shirts and so on. "Sweatshirts Without Sweatshops" was the idea.

That would be very likely to be challenged by the WTO as an inhibition on trade or what they call an unnecessary obstacle. You followed this issue.

MR. SMITH: Yes, because of the garment discussions obviously, yes.

SENATOR HAYDEN: Right. But just to be clear, in following this issue in your niche, you don't go over and talk to Mr. Hatamiya's office about what we should be saying to the U.S. Trade rep in Washington.

MR. SMITH: No. I don't think we've had those conversations.

SENATOR HAYDEN: Okay. But you'll get back to us on how you might do that in the future.

MR. SMITH: Absolutely.

SENATOR HAYDEN: I just don't want California represented by one agency that has one constituency to protect without any consultations about how these policies may affect other parts of the California community.

Senator Solis?

SENATOR SOLIS: Yes. Thanks for coming as well and helping us figure this out. My question deals with the fund that is set up right now for dislocated, displaced workers through NAFTA, and I've always often wondered how we have been doing with the program because there's a lot of issues with respect to the job, where the jobs went, where they need to go, who are the folks that are affected the most. It's been hard in assessing exactly how effective that program has been run. And there's a lot of money that's coming down from the federal government obviously for this effort. My concern is how we can better utilize that fund to better target and gather data and information so that it isn't a hit-and-miss situation here.

MR. SMITH: I have to do a bit of a sidestep and then respond.

Most of that actually goes into the job training area which is over in EDD. But that being said, we do have an incredible opportunity between those resources, the Workforce Investment Act Resources, to really look at what we're doing in terms of job training and what we're doing in terms of apprenticeship and all that. Because one of the points I made, our resource is our folks, and there will be at least some dislocation on individual company bases -- there's no question -- and we as a society, we'd be fools -- as a state, we'd be fools -- not to retrain those folks, not to get them where they'll be productive and not to put them into the industries that are going up instead of that are being hurt by the agreement.

SENATOR SOLIS: Part of the dilemma, I think, is the way it was set up in which the actual corporation or business has to somehow get involved or initiate the process rather than having the state go out there and identify those targeted areas; for example, the sweatshops in South El Monte, whatever, or L.A., and really doing a better method: set up a process where information could be made available to those employees directly in their language in a way that communicates to them more effectively so they can access this.

MR. SMITH: The problem is further compounded by -- and this is a bit of guesswork on my part, I will have to admit. Very often the negative impacts happen in what are currently our lowest wage industries, because those are the folks who compete on that basis. Those are the types of industries that happen to operate the most underground. They are the least likely private sector businesses to come seeking state aid, because, frankly, they're trying to stay as far away from the state as they possibly can. So you have a compounding problem of how they go about plugging into the system.

SENATOR MOUNTJOY: That's the company but not the workers, right?

MR. SMITH: No, not the work -- but it operates through the company. The funding sources operate through the company. If the company is basically trying to stay away from the government, the last thing they're going to do is--

SENATOR MOUNTJOY: But there are dislocated workers--

MR. SMITH: Right. Absolutely.

SENATOR MOUNTJOY: --that need to be -- and I think you need to track where they are and who they are and get to them.

MR. SMITH: Yes. You're absolutely right.

SENATOR HAYDEN: Senator Alarcón, on that point?

SENATOR ALARCÓN: Yes. Anecdotally, Price Pfister in my district shut down and we went through a whole series of processes for over a year. The employer can't get the NAFTA benefits unless they report to EDD.

MR. SMITH: Exactly.

SENATOR ALARCÓN: So you can't avoid, so we must have the information someplace.

But let me just say I have to be complimentary to EDD in the circumstance at Price Pfister. We had workers who were on a Teamsters contract at the foundry at Price Pfister making \$15 an hour after many, many years of service. Many of these workers couldn't read either language, either Spanish or English, and so when Price Pfister moved that operation to Mexicali for 22 cents an hour, we were left with the burden of trying to retrain some several hundreds of employees. I think it was 600 employees. The EDD did a good job of trying to retrain the employees. But when you're going from \$15 an hour without a reading skill, where you're driving a truck or driving a forklift -- you know, I don't know the final outcome of it. I know that we retrained about 200 of those employees at an operation in Burbank and they actually obtained jobs, but I guarantee you the wages weren't anywhere near \$15 an hour. And that information is easily accessible through EDD.

Now, I can also tell you that we lost track of about half of the employees. They just disappeared. We don't know where they went. We can probably do a better job, but there must be a lot of information that's locked up at EDD. I'm wondering if this committee might want to look at some kind of audit through the Joint Legislative Audit Committee to see if we might get some information.

MR. SMITH: EDD will have a great deal of information on the companies who have sought their help. The problem is a great number of the companies won't have sought their help. On those companies, we know nothing.

SENATOR HAYDEN: Also in '97, three years after NAFTA -- do you know Raul Oso_____? He's a professor that specializes in this stuff. He gave testimony -- and maybe you can update it for us, if you remember. This program that you're talking about was supposed to provide aid for communities that were hurt by job loss. At the time of his testimony four areas had qualified for these loans. One was Pacoima. The other's in Northern California, but only one loan, I forget, had been secure, and the problem was, just to go along with Senator Solis, that the people seeking the loan had to prove their future ability to repay it, show that they can't get a loan from any other source, find a co-sponsor, because the program wouldn't finance more than 49 percent of the loan.

This was to be the cushion for that, you know, during that wonderful roller coaster transition to the free market. Some communities would be turned upside down and this program would help re-stabilize the communities. And after a while, lacking this kind of committee or any oversight, I'm sorry to say, I don't know what happened, and it's worth finding out if any of these promises were met or exceeded expectations or were complete failures.

Do you know about that program, Community Adjustment Investment Program, CAIP?

MR. SMITH: No, but I'll find out.

SENATOR HAYDEN: Tell me no.

MR. SMITH: No, I don't.

SENATOR HAYDEN: It's not reassuring, Steve.

MR. SMITH: Sorry. (Laughter) You want me to lie?

SENATOR MOUNTJOY: One of the major problems with the Price Pfister operation -- those are toilet valves and they make faucets and stuff like that -- but downstream employees who do the de-burring in a separate shop, who are doing the casting, all of that type of thing in a separate shop, then lose. So there's probably, if

there's 600 direct employees at Price Pfister to do the assembly and do all the things that they have the skills to do, they lose. But then you go downstream and you're probably doubling that amount of downstream employees that work in other small shops around the area that do the deburring and the tumbling and all of the stuff that goes on into a manufacturing process, the automatic lathe work that people can do, and I think those need to be tracked. Probably EDD would have something, but I think we need to know that.

SENATOR ALARCÓN: With regard to Price Pfister, I'm looking at it a little bit differently.

SENATOR MOUNTJOY: I understand.

SENATOR ALARCÓN: All the workers that were laid off -- and not all the workers were laid off; some are still working -- because all they do there now is package. What they used to do is the foundry work. So all those workers were the ones that lost their jobs.

But the interesting thing, when we conducted some meetings with the workers and some of the Teamster representatives, the workers, say, they would average between 10 and 20 years of tenure at Price Pfister. Well, when you think about it, most people, when they're 10 to 20 years of tenure at an organization, they've set their sight in terms of their lifelong economic budget. Most of these people were homeowners and their loans were set at a level that a \$15-an-hour worker could obtain.

So one of the ramifications of this was many of these people lost their homes. Nobody's gathering that information. Many of these people had to readjust their lifestyles to a lower economic strata because they were getting jobs at \$6, \$7 an hour as a replacement for a \$15 job. Many of these workers had kids in college that they could no longer afford to send to college. So some of the other ramifications of the transition were never reflected in any documentation but they were real-life stories

that had a negative impact on California in terms of overall productivity and overall economic resources. These were consumers who were taken from a \$15-an-hour wage and their purchasing power was reduced by less than half.

That's the kind of information that I would like to see. Where is that economic benefit?

SENATOR MOUNTJOY: Well, the benefit, I can tell you right now, Price Pfister did not lower the prices on their faucets. (Laughter) Go into Home Depot and try it.

SENATOR HAYDEN: All right. Thank you very, very much.

Secretary Nichols. Now you're getting anxious.

SECRETARY MARY NICHOLS: I'm sorry. I have another appointment.

SENATOR HAYDEN: That's right. Pressures are kicking in.

SECRETARY NICHOLS: Senator Hayden, I was going to suggest that it might be productive if I call the representative of Cal-EPA, Deputy Secretary Deborah Barnes at the same time.

SENATOR HAYDEN: At the same time, that would be excellent. Great. Thank you.

SECRETARY NICHOLS: I think you'll find she has more of substance to offer.

SENATOR HAYDEN: She's been nodding back there and shaking her head.

SECRETARY NICHOLS: Good afternoon. Yes, I'm Secretary Mary Nichols from the Resources Agency.

SECRETARY DEBORAH BARNES: And good afternoon...(inaudible – not close to a microphone).

SENATOR HAYDEN: Congratulations. Thank you.

SECRETARY NICHOLS: Thank you for inviting us, Mr. Chairman, members of the Committee. It has been an interesting hearing...(inaudible gap in tape)...

SENATOR HAYDEN: We hear you but you're not on.

I did it. I'm sorry, Keith. All right. Sorry.

SECRETARY NICHOLS: Thank you. Just by way of brief background, in my former life as an NRDC attorney, I was involved on the environmental side of raising a number of the environmental issues about NAFTA. Later, when I worked for the U.S. Environmental Protection Agency, I had an opportunity to appear, although not directly, indirectly in front of the WTO in the very first case.

SENATOR HAYDEN: I thought you'd be terrific as having this multi-agency, multi-level perspective on these issues.

SECRETARY NICHOLS: But just for information purposes, as far as the Resources Agency is concerned, it's fair to say that we do not have any detailed or even anecdotal information that would suggest that the very real concerns that have been raised by your consultants and others about the potential impacts of WTO and NAFTA have actually had an effect on our natural resource protection programs. And I think that's partly because the specific laws that we operate under tend to be a very locally based resource, local resource based, and therefore have not had a direct impact on us.

I did want to say that in the one aspect that we are involved with in the implementation of NAFTA through the CEC, we have seen some evidence that, because of the existence of this new vehicle that was created under NAFTA, there has been a mobilization of both governmental and non-governmental agencies on both sides of the border, as well as educational institutions working to improve our management, particularly of marine resources.

I think, although there is certainly no direct connection there, the fact that when the California Coastal Commission voted to ask the government of Mexico not to proceed with the Mitsubishi salt plant in the San _____ Lagoon, that when the government of Mexico made the decision to stop that project, although they clearly rejected the environmental arguments that had been made against the project, they did say that because of its status as a world heritage site, that they felt that the salt manufacturing was inappropriate.

Regardless of the rationale, the fact that that contact was able to occur and that the message was received in a positive way, I think is, to some extent, an outgrowth of the greater communications and cooperation on a more equal basis that have been occurring between the two countries as a result of increased trade.

My experience, since I've been in the state government, with respect to the border has been through the Board of State Governors' Organization. I did participate along with Secretary Hickox in the environmental meetings and discussions. A member of my staff is part of the team that drafted the agreements that led up to that conference, and I think it's just worth pointing out that, as a result of that meeting, all of the border states called upon their federal governments for increased aid and attention to border issues. This is an area where, although the conversation is at a governor-to-governor level, I think there's a role that would be appropriate for the legislatures as well.

SENATOR HAYDEN: In the border?

SECRETARY NICHOLS: Yes, exactly.

SENATOR HAYDEN: I used to serve on that under Jerry Brown.

Is that created in statute? Is that created by Executive Order? What's the underlying foundation of that? It may be an Executive Order. Does it receive state funds, though, from the Legislature?

SECRETARY NICHOLS: Yes. Yes, they do.

SENATOR HAYDEN: All right. So it's somewhere. Okay.

SECRETARY NICHOLS: They do. I believe it was created as a result of an agreement among the various states, not by statute, but it has been funded by the Legislature.

SENATOR HAYDEN: Okay. And what's it called technically again? I'm sorry.

SECRETARY NICHOLS: I think it's known as the Board of State Governors Association.

SENATOR HAYDEN: Okay.

SECRETARY NICHOLS: I have no other testimony but I'm happy to answer any questions.

SENATOR HAYDEN: Well, you followed the discourse previously so I assume that you've not been consulted by the state contact person about issues affecting California because there isn't really a structure. Is that right?

SECRETARY NICHOLS: There is no structure; that's correct.

SENATOR HAYDEN: Would it be beneficial to have a structure, in your opinion, or is the ad hoc convening of a structure when there's an issue or a crisis sufficient? Do you have any thoughts on that issue?

SECRETARY NICHOLS: I think perhaps Secretary Barnes might have some comments because they've been directly involved in the issues with Canada.

From my personal perspective, though, I think on the issues of trade in California, you're right to point out that the focus has been exclusively on opportunities for California business, opportunities for export of environmental technology. For example, it was referenced earlier that there is disagreement that's been evolving between the California Energy Commission and the Trade Office. And these are good things, but we haven't really focused on collecting the information that we would need to assess the impacts that may be less positive and to help us develop strategies.

SENATOR HAYDEN: Have you seen the Georgetown University Study of all these laws that are potential?

SECRETARY NICHOLS: I received it today, actually. I'm sorry I wasn't aware of it earlier.

SENATOR HAYDEN: That's all right.

SECRETARY NICHOLS: But yes, it's impressive.

SENATOR HAYDEN: Thank you.

One of the proactive strategies being mulled over by the Georgetown law people is -- since the NAFTA and WTO structures are more complicated than I can understand or describe; I'm simplifying them -- that you could actually, on the basis of what we know now, redo state law to make it more protected, taking into account all of these new standards. That's why we don't have to necessarily look at this list and wait for something to happen. I mean, they're recommending ways to take into account what the WTO criteria are.

I am concerned about the Endangered Species Laws, the protection of mammals, migratory bird protection. It would require a proactive look, and I know the Governor doesn't want to spend more money, that we don't want to add more PYs, chasing fantasy threats, but would you give some thought to how the agency might proactively look at what's down the road and recommend to us, if you have any thoughts, what should be the relationship to the Legislature and between your agency and other agencies and those in the Trade Rep, and if you have any thoughts now on what it was like in Washington to be on the other end of it, where states are seen as kind of pesky gnats buzzing around the federal ear. Or did you like to play on the differences between states to reconcile them?

SECRETARY NICHOLS: Actually, neither of those things reflects my experience.

SENATOR HAYDEN: What would it take for California to be heard decisively, in spite of the fact that we only have, at best, an advisory role in this process?

SECRETARY NICHOLS: Well, let me just say that in the case that I was directly involved with, which related to the standards for reformulated gasoline, EPA, where I was working, was heavily impacted by the views of states in the northeast that were very concerned about differential enforcement for U.S.-based refineries versus foreign refineries.

SENATOR HAYDEN: This is when you were in Washington, at the EPA.

SECRETARY NICHOLS: This was when I was in Washington. And when we solicited the help of the U.S. Trade Representative in defending our regulations, we had a very difficult -- that was a very difficult relationship because the Trade Representative's job is to promote trade and they were very unsympathetic to our arguments because our arguments weren't relevant from the structure that they worked in. They did their best to defend us because they had to.

SENATOR HAYDEN: How does that get reconciled at the federal level? Does the White House have to hear about it and reconcile the different agency agendas?

SECRETARY NICHOLS: The White House played, certainly, a very direct oversight role. The Secretary of the Treasury at that point, Secretary Ruben, took a very close interest in what was going on in the development of our case and other cases that were being handled by U.S. Trade Representative, and they were very mindful of the environmental issues and of the politics which were also congressional politics because there was a great interest in Congress at that point in defending the regulation that EPA had adopted. But we lost the case in front of the WTO, and at the end of the day--

SENATOR HAYDEN: What was the issue?

SECRETARY NICHOLS: The issue there was whether there was a less trade restrictive way for the U.S. to go about enforcing the regulations on manufacturing reformulated gasoline. Basically, we had come up with a two-tier system for enforcement of the standards for reformulated gasoline. One was based on the notion that companies that operated here in the United States, refineries that were onshore, could produce records that could, in effect, qualify them for an easier enforcement path; whereas, companies that were operating offshore would be more difficult to visit, to monitor, to oversee, and therefore required a higher level of scrutiny.

I'm oversimplifying a little bit but the court ruled that out of order.

SENATOR HAYDEN: I'm confused.

Is this the same case that involved letting Venezuelan oil into the United States?

SECRETARY NICHOLS: Yes.

SENATOR HAYDEN: The effect, so the critics said, was to let a dirtier resource into this country, making it harder for California to comply with--

SECRETARY NICHOLS: Well, actually, since California has its own standards for gasoline, it didn't directly impact California. It was primarily an issue with the northeast.

But again, to get to your original question, the states in the northeast were very active in presenting their views.

SENATOR HAYDEN: So it sounds like the process is kind of old-fashioned politics rather than something that has its own clear constitution and checks and balances. In other words, if somebody makes a move, the affected parties, like the northeastern states, get really aroused, they go to their Congress. Agencies that have different mandates within the federal government fight it out. Eventually, it comes to the attention of the White House and it gets somehow reconciled.

SECRETARY NICHOLS: Well, I think that's how it actually worked in the early stages. But I think, for purposes of the questions that you're asking and the program that you're perhaps helping to create here--

SENATOR HAYDEN: It won't do, right.

SECRETARY NICHOLS: --what we need to do is to think ahead. Our problem at EPA was that we didn't see this coming. We didn't know that we had to write our regulations in a way that would survive and attack in front of the WTO.

SENATOR HAYDEN: That's what I was thinking. You might consider, it's a terrible thought to ponder, but do we have to rewrite California laws and regulations to protect ourselves against these challenges, and can we? And is there a way to be proactive instead of waiting for some surprising event, some lawsuit from somewhere?

You know, this sharpshooter, trying to trace it, it appears that we might have blocked how the sharpshooter got here but we couldn't because of these trade regulations. It comes in mysterious and surprising ways.

SENATOR MOUNTJOY: Mary, you said that the EPA had a problem with their reformulated gasoline with WTO.

SECRETARY NICHOLS: Yes.

SENATOR MOUNTJOY: What about the California regulation that is a higher standard than the standard EPA, national EPA standard? I mean, that would be a direct effect on -- wouldn't that affect California?

SECRETARY NICHOLS: Not necessarily, because the problem with our EPA regulation wasn't the standard per se. It was the enforcement methodology, which basically discriminated against foreign refiners. And we did that deliberately. We felt we had good rationale.

SENATOR MOUNTJOY: Discriminated between the offshore--

SENATOR HAYDEN: Right.

SENATOR MOUNTJOY: Okay.

SECRETARY NICHOLS: Exactly, and we don't do that in California.

SENATOR MOUNTJOY: So it wasn't the reformulation.

SECRETARY NICHOLS: Correct. There was not an attack on the reformulation per se.

SENATOR MOUNTJOY: But under a lawsuit or a settlement, a judgment, I guess, that Senator Hayden mentioned a while ago, where there was a suit and we lost because the federal government had pre-empted - what was the preemption, Tom, that you mentioned originally?

SENATOR HAYDEN: I'm sorry?

SENATOR MOUNTJOY: The preemption that the lawsuit settled? And remember, I asked you about it? I said -- I mean, it preempts California law? You mentioned it at the first of the hearing.

SENATOR HAYDEN: On the MTBE?

SENATOR MOUNTJOY: Yeah. Well, or any of that.

SENATOR HAYDEN: Methanex or--

SENATOR MOUNTJOY: Yes. That preemption, wouldn't that then, that same thing that says the federal preempts, wouldn't that preempt California standard gasoline?

SECRETARY NICHOLS: Not necessarily.

SENATOR MOUNTJOY: That same argument? Were you here in the first--

[recording difficulties]

SECRETARY NICHOLS: ...very beginning of the hearing and I--

SENATOR HAYDEN: Hold on just a second. Madam Secretary, you have to go, right?

SECRETARY NICHOLS: I do.

SENATOR HAYDEN: Any other questions for -- thank you very much for your comments.

[recording difficulties] Thanks very much. We'll continue the dialogue.

Deborah Barnes, thank you very much.

MS. BARNES: Thank you. Just to give you a little bit about my background, because I know--

[recording difficulties]

SENATOR HAYDEN: ...and then go to this question and then back to your testimony.

MS. BARNES: I'm a lawyer by trade. I _____ the Attorney General's Office. I worked in the Natural Resources Section here in Sacramento for several years. So I'm

sort of a generalist in many respects and those skills have been put to use in the Cal-EPA.

If you could repeat your question to me that would be helpful.

SENATOR MOUNTJOY: My question was, because of the court decision that--
[recording difficulties]

MS. BARNES: ...discriminatory on its face, so to speak. If there's a difference, or there's a _____ to why a state is _____ higher bar, so to speak, on a certain constituent _____, or what have you, gasoline or other _____ court attack in the more traditional sense or an attack that we've seen come through NAFTA. So it does not automatically translate, I don't believe, into a disruption of California's own statutory and regulatory schemes in that regard.

_____ a little bit longer than some of the others, but I will try to keep my comments brief.

Basically, I do have some background, if you're interested, in terms of the WTO and NAFTA, and I have prepared three examples, one of which Secretary Nichols has already discussed in terms of specific challenges. The bulk of my personal preparation was in dealing with the Methanex MTBE issue that's currently pending pursuant to NAFTA.

Even though there's been substantial concerns about the potential impacts of the WTO and the North American Free Trade Agreement on California's environmental laws, we have not seen a direct correlation between that concern and any valid...[recording difficulties]...deviate from my prepared talk.

As I prepared for today's hearing, this is my...[recording difficulties]...between the trade agreements that I knew to be true in my own personal experience, and the basis of the concern as it had been expressed to me from different sources. And one of them is how could this tribunal somehow issue an order that would invalidate one of

California's regulations or laws? And once I had a better understanding, I think, of how the system was set up, it kind of answered that question for me.

I guess there's an upside and downside to California as separate entity not being a party to these trade agreements. One of the upsides is that we cannot be called as a party specifically in front of these tribunals. It is the federal government that appears as a party in front of this tribunal. Maybe now would be a good time to talk about the Methanex case and where we are with that and some of our experiences--

SENATOR MOUNTJOY: But then aren't we losers in that? Not being a party to it, we still are the losers.

MS. BARNES: I understand what you're saying, and I understand the genesis of that comment. Like I said, my own background is primarily as a litigator. And that's sort of how I so far filter some of my thought processes.

SENATOR HAYDEN: You're in a different thought process now.

MS. BARNES: Boy, tell me.

SENATOR HAYDEN: We'll have to draw you into our way of thinking.

MS. BARNES: Hopefully, my learning curve hasn't been exhausted yet.

SENATOR HAYDEN: You get to litigate after we do what we do.

MS. BARNES: I've done that more than once.

SENATOR HAYDEN: Different way of thinking.

MS. BARNES: Indeed it is.

As I went through that thought process myself, you're right in the sense that by not being a party doesn't give us as much control over what's presented to the tribunal. It doesn't give us as much input in a technical sense. The benefits of not being a, quote, "party" in front in that tribunal is that we're not subject to that tribunal's jurisdiction in any direct fashion, and we're not bound by any ruling that that

tribunal would hand down. And I think the Methanex case that you all have referred to several times, it is a classic example of that.

So I'm going to turn in my comments--

SENATOR MOUNTJOY: So what you're saying is regardless of what is settled with the federal government and Methanex, regardless of the lawsuit, we do what we want to do? We continue the phase-out that Governor Gray Davis has indicated, the timetable?

MS. BARNES: As far as my understanding, that is correct, unless Congress, as a result of any negative ruling in that matter, somehow passed a law that said to California: We're going to say that you cannot phase out MTBE because of this NAFTA ruling. I suppose that's a potential scenario. Is that a likely scenario? Probably not.

SENATOR HAYDEN: Let me help you. Isn't the scenario that the WTO could take retaliatory action against California as long as we've been found in violation on the MTBE case? They can arbitrarily -- and they have -- they can arbitrarily single out something that we really want to sell, and say: We're taking away \$970 million worth of value.

That's what I understand is potentially unleashed.

SENATOR MOUNTJOY: That's a forfeiture type of thing, isn't it?

SENATOR HAYDEN: I don't know what to call it. It's very, very complicated but I think you're making it more -- you're probably smarter than I am, and you're disaggregating all this stuff, and I'm trying to close it to see what the relationship says, because they didn't set this deal up to have no effect on California, did they?

MS. BARNES: I'm not saying it would have no effect. I'm saying that the direct effect of the NAFTA tribunal ruling that would invalidate, per se, a California regulation or statute, I don't see that within this scheme that is here.

SENATOR HAYDEN: Well, what about the Massachusetts law that was struck down?

MS. BARNES: That situation, I'm not that familiar with. In terms of my -- and I'm happy to look into that further and give you additional comments on that.

SENATOR HAYDEN: But they struck down a state law, and that state law is more or less duplicated in any number of California cities. The question would be: Now what happens to our cities? Are they exposed as a result of--

MS. BARNES: Mm hmm.

SENATOR HAYDEN: But that's a case that had a real effect.

MS. BARNES: I understand what you're saying, and I'm not personally familiar with that case, and I'm happy to look into that and add that into the hopper in terms of my comments.

SENATOR HAYDEN: But you don't think an adverse ruling in the Methanex case will have consequences for California?

MS. BARNES: Again--

SENATOR HAYDEN: We can just go ahead phasing out MTBE?

MS. BARNES: At this point in time, given how I understand what the structure is with NAFTA and the tribunal that is hearing that matter right now, what would happen if there was a negative ruling? What would happen if there was a \$970 million judgment against the United States government? To collect that judgment, the Methanex would have to take it into a United States court to try to collect that judgment unless the federal government just decided to hand over \$970 million. And it would arguably start a whole other court proceeding where there could be conceivably collateral attacks on the judgment. There could be collateral attacks on the process.

SENATOR HAYDEN: You're figuring out a great lawyer's defense of the state's action, but notwithstanding that, the adverse effects would be threatening us. They'd be real, otherwise why would you go into another court to fight them off?

MS. BARNES: I think it's because of -- I think it's inherent within the Methanex case. Perhaps now would be a good time to kind of step back and give a little bit more background on the Methanex situation, because I know that is one of the few examples that we have right now where there's been a challenge brought pursuant to NAFTA.

Basically, under NAFTA, Methanex claims that the Governor's Executive Order and the subsequent state actions involving MTBE have constituted an ex-appropriation of Methanex's investments to produce methanol that would ultimately be used in MTBE here in California.

As you know, there was an Executive Order, D-599, ordering the Air Resources Board to initiate rulemaking to ban MTBE in gasoline and to undertake a variety of related activities. The Executive Order was based on substantial public input, peer reviewed scientific papers, and the conclusions of Cal-EPA that MTBE posed a substantial risk to California's environment relative to any air quality benefits that it could provide.

In June of '99, Methanex filed a Notice of Intent to submit its ex-appropriation claim to arbitration. This was a predicate to filing a claim against the United States which occurred in December of '99. Methanex's statement of claim ____ \$970 million, its alleged future loss profits and diminished market value, as a result of California's proposed ban on MTBE in gasoline. The claim is against the United States federal government, which is the entity that is the signatory to the NAFTA agreement.

The arbitration panel was convened pursuant to -- there's a little acronym that I can't pronounce -- but to these rules, that I can give you the information on just a moment. And the State Department has involved California in each step of the process, including soliciting the state's input on arbitrators that are convened as a result of the NAFTA scheme.

We believe, and the federal State Department believe -- their behavior has certainly suggest they believe -- that California's involvement is crucial in developing a

full defense of the claim, because California, we have the information on the claim, we have the substantive information, and we have the legal and substantive expertise to assist them in defending the claim.

Even since I've been in my position, I've seen a lot of communication and a lot of outreach from the State Department in involving both Cal-EPA, the state Water Resources Board, and Air Resources Board in defending the claim that has been brought.

It's been our opinion that the State Department has mounted a very vigorous defense on August 11th, this year. We'll file a Statement of Defense, asserting numerous jurisdictional reasons as to why the arbitral panel cannot consider Methanex's claim. There's also substantive reasons that are being brought to the arbitration's attention.

If the claim is dismissed on jurisdictional grounds, which a prior claim brought by Methanex was dismissed on a jurisdictional ground, Methanex, prior to filing their Chapter 11 claim on the ex-appropriation issue, had filed a claim under the environmental side agreement under NAFTA under Article 14. After they had filed the Chapter 11 claim, that Article 14 claim was indeed dismissed by the CEC because they already had a claim pending.

So it was, again, a jurisdictional argument where the United States, again getting our assistance, involving us very intimately in the process, they were able to convince the CEC to dismiss their Article 14 claims. So we've already had one victory, so to speak, in defending Methanex's claim against the United States.

Basically, if it's a situation where the claim is dismissed on a jurisdictional basis, they will not even address the substantive issue of whether California's actions were justified, which they were. Any adverse decision by the panel would come from the United States Federal Treasury and California's proposed phase-out would still remain in effect.

So in terms addressing some of the issues, it would basically take a congressional act or some other legal structure, whereby the federal government would have to somehow reach down and invalidate California's existing laws in terms of air quality and water quality. And we already operate under a certain tension between the state and federal schemes in both the air quality and in water quality.

I'm sure you're all very well aware that the federal statutory schemes create a baseline for various air and water issues, and that California laws often will raise the bar, so to speak. And we have stricter standards, and federal law recognizes California's ability to do so. And traditional preemption in that regard doesn't occur in many of our air quality and water quality schemes.

SENATOR MOUNTJOY: We voluntarily comply with that federal law, right?

MS. BARNES: Which federal law?

SENATOR MOUNTJOY: We don't have to comply with that federal law because Article 10 of the Constitution says they don't have a right in the environmental area. We sort of voluntarily comply because they blackmailed us into it, withholding the money.

MS. BARNES: Yeah, there's a certain element of push and shove in that regard, yes.

SENATOR HAYDEN: Here's what I don't understand. What were you doing for a living when the Methanex case was filed? You were working at the Attorney General's Office?

MS. BARNES: That's correct.

SENATOR HAYDEN: This hearing is partly about the ins and outs of the Methanex case. I'm not comfortable with the testimony that it's nothing for the Legislature to worry about, which seems to be what you're saying. But there's another issue for the Select Committee, which is what is the relationship between the Attorney General and the State Legislature? What is the relationship between Cal-EPA and the

State Legislature beside we fund agencies? This is our law. We've never been briefed on what the Attorney General's Office was doing, if anything.

I still don't know from your testimony. Did the Attorney General take part in this process or not?

MS. BARNES: In which process?

SENATOR HAYDEN: Since the Methanex case began, did the Attorney General contact the Governor, contact the U.S. Trade Representative, seek to participate in the case, do legal research and try to submit briefs? Did the Attorney General's Office have any meetings ever with anyone in the Legislature about how to defend our MTBE policy from this attack, which you may say we'll be able to defend against?

So it's two issues. You know, is it a real threat? -- we can disagree about that -- but what's the role of the Legislature in the process?

MS. BARNES: I understand what you're saying, and please let me -- my testimony here today isn't that there's no role for the Legislature in dealing with trade issues or in protecting California's regulatory and statutory schemes against outside attack. That certainly isn't what my testimony is about. As I sat and listened to the various questions in the testimony of those who preceded me, it seems to me that there was a great deal of interest in what was happening with one of the few specific examples we have of a challenge to a California Executive Order and other laws involving MTBE. So that was where I wanted to begin with my testimony.

In terms of the Attorney General's Office, I'm not in a position to speak for them on a policy basis. What I can tell you, however, is that the Attorney General's Office has been very involved with Cal-EPA, the state Water Board, and in a very collaborative, consultative fashion in dealing with the Methanex issue and assisting both the Cal-EPA and the state Water Resources Control Board and the Air Resource Control Board in bringing their expertise to the table.

SENATOR HAYDEN: Good. Who from the Attorney General's Office was doing that?

MS. BARNES: Susan Durbin has been assisting us from the Attorney General's Office.

SENATOR HAYDEN: She's the one who's on vacation?

MS. BARNES: You know, I don't know if Susan's on vacation. Nancy Suttley is on vacation.

SENATOR HAYDEN: No, I'm saying we've had several letters from the Attorney General's Office about one Susan Durbin who they wanted to send over to testify but she's on vacation. She's the point person.

MS. BARNES: She's the individual that we've interfaced with.

SENATOR HAYDEN: We'll be talking to her when she's--

MS. BARNES: What her interactions are with the Legislature, I'm not in a position to speak to. But I'm certainly not here saying there's no role for the Legislature in dealing with these processes.

SENATOR HAYDEN: I didn't hear you say there's no role for the Legislature, and I think it would be impolite to--

MS. BARNES: Well, it would be rude.

SENATOR HAYDEN: Right. But I'm trying to establish that the Legislature has no role in these processes involving executive agencies. even though the implementing laws of WTO and NAFTA call for consultation with the states, the term state has been appropriated to mean executive branch apparently.

MS. BARNES: I think yes and no. I mean, I understand the genesis of your comments. In terms of larger policy issues, to my knowledge there is no systemic structure that says that if this policy issue comes up, you shall consult with this individual from the legislative branch, this individual from the executive branch, or this

individual from the judicial branch of government. To my knowledge, there is no structure of that type.

However, what we can best testify to today is what our experience has been in terms of a specific instance that is one of the main challenges under NAFTA, and that's what I have tried to express to you today.

SENATOR HAYDEN: And again, the Legislature has not been consulted with respect to the Methanex case.

MS. BARNES: To my knowledge, no. And whether that's a function of any intent to exclude, I would be hesitant to make that conclusion. I think part of that function comes from how it's been set up in terms of what agencies have been in the forefront of dealing with the MTBE issue. We're the ones who have been in the position -- for example, if Methanex had decided to sue the Air Resources Board or the State Water Resources Control Board in federal court, for example, and alleged a taking of their property, which they could have done. We think there's very definite reasons they chose not to do that because we don't think they would have had a viable case. Had they chosen to do that, then we would have started going through the regular process of referring the case to the Attorney General's Office and preparing for a defense to that legal action. And to my knowledge, there is not a systemic way to involve the Legislature in that process when you're defending against a lawsuit.

And in terms of the Methanex case in front of NAFTA, I think that was the similar sort of process that we engaged in. Now, that doesn't mean to say there isn't room for a more inclusive process, if there's the need to get more input from the Legislature on that process. That's certainly something that I think would benefit from further discussion.

SENATOR MOUNTJOY: May I just ask a question?

SENATOR HAYDEN: Yes, Senator Mountjoy.

SENATOR MOUNTJOY: A little bit different. But you said there would probably be no jeopardy to California as far as if we lost the Methanex thing, but couldn't the Environmental Protection Agency come against California for that money if in fact we lost?

There was a congressman, I can't come up with his name right now, but when the Massachusetts thing was going on, he proposed a bill in Congress that would say that they couldn't come after the states for the money lost under NAFTA. And then that kind of got dropped. And I think he's going to bring it up next year. So in fact, California would be impacted if the federal Environmental Protection Agency decided to come after us for that money.

MS. BARNES: That is certainly a potential. My understanding of how the structures are set up, there would have to be basically a federal law that would have to change in order for USEPA to come to the state of California and say, *Give us \$970 million or we're going to withhold \$970 million worth of federal aid to your various environmental programs.* If they tried to do that, I would anticipate that the state itself would be defending against that action in court I think faster than--

SENATOR MOUNTJOY: Well, the reason that he was proposing that law because he felt that under the EPA that they could do it unilaterally without congressional--

MS. BARNES: Again, what my understanding is at this point, and I think it would take a more drastic change under this scenario for them to come after us for the \$970 million should it get there. We don't think it's going to get there. If it does get there, we don't see that as a likely scenario.

I'm not as familiar with the Massachusetts case that you have referred to. I'm happy to look into that, and again put that information into the analysis for future hearings, or whatever fashion, written form, whatever you would find most helpful.

SENATOR HAYDEN: All right. You have more?

MS. BARNES: Well, there is some additional information that we understood that you were concerned about with Proposition 65. Proposition 65, again, when we looked at whether or not there's a possibility of having that statutory scheme upset or overturned by an after-ruling, an adverse NAFTA ruling, again we look at kind of what the basis of that law is, is whether or not there's any discriminatory implementation or other ways of dealing with that law. And there really isn't. Proposition 65 mandates that certain carcinogens and other agents are listed regardless of the country of origin, regardless of the state of origin. We hope to make sure that it's dealt with evenhandedly. There's no discriminatory effect without having a good reason, basically.

In terms of the discharge into the state's waters, again, that's within the boundaries of California. Even though I'm sure there's someone out there who could fashion a creative challenge on that, we think that would be a difficult challenge to sustain.

In terms of air quality laws on a very broad stroke kind of basis, again, those usually deal with discharges that are happening within the state of California into the airs of California. And again, we're not saying somebody couldn't fashion some type of NAFTA claim on that basis, but we think, again, it would be difficult to mount a successful claim that could affect California's air quality and water quality laws under that scenario alone, without additional information or additional facts.

SENATOR HAYDEN: Let me go back on Prop. 65. I can't find my file on Prop. 65, but again, I'm uneasy with your comfort about this. For instance, one of the arguments used in Congress now, our Congress, to preempt Prop. 65 is that there's pressure from the Europeans. That's all political. If they do that on the federal level, I don't know what our legal action would be, and they've tried every year for ten years. And now I think they have the votes. And I don't know whether the President, Clinton,

who supported the challenge to the Massachusetts law, will stand up or not on Prop. 65. But I wouldn't like to have our efforts depend on the trends in the White House.

MS. BARNES: I understand what you're saying, and I think that you're very accurate when you say that there's a more viable threat to Proposition 65 from the federal government, and a change in law, and an attempt on their part to try to preempt Proposition 65.

I guess in my own mind I somewhat separate that from a more indirect successful challenge that would happen vis-à-vis, say, example, an entity suing the federal government based on a Proposition 65 ruling and then having the NAFTA tribunal somehow undermining what Proposition 65 is.

SENATOR HAYDEN: Weren't the GAT standards incorporated into NAFTA and WTO?

MS. BARNES: That I'm not familiar with.

SENATOR HAYDEN: Well, they were, I mean, unless there's something I'm missing. And those standards require a showing that you've based your decision entirely on science and on a certain model of risk assessment. And with Prop. 65, the campaign slogan was a popularization of a scientific concept: better safe than sorry -- the precautionary principle, which is less than scientific objectivity.

So that's the European complaint, that the Prop. 65 standards are a barrier. I think that may also apply to organic labeling and a number of other issues. So let's check on that. You know, you have a warning label that says this could cause birth defects. The Europeans don't like that because what is "could"? Their argument seems to be that the label has to say, "Will cause birth defects," which is absurd because then the product couldn't be sold.

So this whole difference between the standards, that's the kind of issue.

There's one other issue that's similar to this where the shoe's on the other foot. I say it's the husband of somebody from British Columbia. There's a California

corporation that sued Canada to go after British Columbia. Guess why? Because British Columbia wants to ban wholesale exports of fresh water on tankers to California. And that's the same issue. Is there a public trust power that a state has over, say, its water supply? If the California company wins, the -- yeah, this company is Sunbelt Company. They want to get fresh water, put it in tankers from British Columbia, and bring it down.

SENATOR MOUNTJOY: And then bottle it up, I guess.

SENATOR HAYDEN: Well, I don't know. Solve whatever drinking water crisis we may have. And the British Columbians, of course, are hot on this, not taking our water. It's kind of Mono Lake all over again going further and further north.

I don't know the disposition of that case, but if British Columbia loses, wouldn't then somebody be able to challenge any attempt by California to preserve and protect our environmental resources?

MS. BARNES: Again, I'm not familiar with the specific example of a state wanting to import water from British Columbia.

SENATOR HAYDEN: It's a company. They're suing, that goes to these tribunals. We're not involved. Are you? Have you been asked to show up?

MS. BARNES: For which?

SENATOR HAYDEN: For the Sunbelt case?

MS. BARNES: No, I have not.

SENATOR HAYDEN: No, this is just happening to us.

MS. BARNES: It does happen. Just as an aside, it happens to us frequently in the regular court system as well. There are lawsuits that will happen that we are often not involved with. I'm not familiar with the facts of this case that you're referring to.

SENATOR HAYDEN: Okay.

MS. BARNES: What I can tell you, though, is I do think that there is recognition in both NAFTA and the WTO, and certainly under state decisions and federal decisions,

that the federal government and/or the states do have in their police power the ability to protect public health and safety, and protection of clean water, clean air falls in that gambit.

SENATOR HAYDEN: That's what the whole issue is: Will they under this new constitutional structure for the world?

MS. BARNES: Well, that's a larger, I mean--

SENATOR HAYDEN: You're assuming that states are at no risk.

MS. BARNES: No, I'm not assuming that they're at no risk. In preparing for today, what I was looking at is what -- again, maybe it's in terms of my own training and background. The Methanex challenge for example. What would an adverse ruling do? What would be the effects on California? Would there be a direct effect? And that was a harder question for me to answer and come to the conclusion of, yes, there would be a direct effect because the direct connection there between California as an entity and a party in front of that tribunal isn't there. Could there be an indirect effect? There potentially could be, but it would be a much more attenuated effect, a much more speculative.

I'm not sitting here saying that the Legislature doesn't have a role in participating in developing other structures, if that's appropriate, in terms of federal and state communication in dealing with these issues.

SENATOR MOUNTJOY: What isn't our backside being protected in that? Why don't we have an agency, an environmental protection agency or whatever, that is aggressive in going back there and making sure that things are going our way? Or is that not our role?

MS. BARNES: You mean in terms of--

SENATOR MOUNTJOY: It's sort like an amicus brief basically because we are, in fact, a party to it although we're not represented there.

MS. BARNES: And we feel in terms of the Methanex situation, which is, again, our most current experience, we have been intimately involved in the defense of the case. The State Department has incorporated our comments into their briefs. They have consulted with us. We do anticipate going back to Washington, D.C. on September 7th to observe--

SENATOR MOUNTJOY: Oh, so you're going to do that.

MS. BARNES: Yes. Please don't misunderstand me. I'm not saying the state doesn't have an interest, that the state shouldn't be involved in the process, but I look for the specifics of what direct effect...[tape turned]

SENATOR HAYDEN: ...I think perhaps because of the discipline that we come from, and I think we should just leave it there. But you really have to understand that there's a disagreement that has to be resolved here.

MS. BARNES: I understand that.

SENATOR HAYDEN: I don't feel protected in the least by this.

MS. BARNES: I do understand that.

SENATOR HAYDEN: Maybe I'm crazy but I swear they can take retaliatory action against us.

MS. BARNES: What I would be happy to do is submit to the committee a full version of my prepared comments.

SENATOR HAYDEN: That's all right. I just don't want to see an argument about why we could legally defend against the retaliatory action, because it all comes back to, you know, your assertion that we've got this sort of legally figured out and our state is really immunized against any impact. It can't be so in light of the Massachusetts ruling.

MS. BARNES: I will look at the Massachusetts ruling for this committee.

SENATOR HAYDEN: We lost.

MS. BARNES: I understand what you're saying.

SENATOR HAYDEN: And your former -- the Attorney General was amicus. He lost.

MS. BARNES: I understand what you're saying, and I apologize for not being personally familiar with that case, and I will certainly take a look at that and incorporate it.

SENATOR HAYDEN: No. We're not legally immune, is what I'm saying.

MS. BARNES: And again, I don't want to overstate my point. I'm not saying California doesn't have an interest, that everything is okay, and we have nothing to worry about. But in terms of our specific examples, and I look at the structure, the direct impact is more attenuated than it may appear at first blush. That's been our personal experience. However, that does not mean that other issues have been resolved, that there aren't other issues out there to resolve.

UNIDENTIFIED: And perhaps I can provide you with some examples and background of some retaliatory measures that have been taken.

MS. BARNES: Sure. That'd be great.

SENATOR HAYDEN: Okay.

Anything further?

MS. BARNES: I have nothing further.

SENATOR HAYDEN: All right. Thank you so much.

MS. BARNES: Thank you.

SENATOR HAYDEN: Sorry to keep banging on this same issue.

MS. BARNES: No. It helps me. It's my first exposure.

SENATOR HAYDEN: I'm sure we have more in common than not.

Senator Mountjoy and then we'll wrap up.

SENATOR MOUNTJOY: There was a case in Canada where a U.S. company sued Canada, another additive, MMT.

MS. BARNES: That's correct.

SENATOR HAYDEN: That was the Essel Corporation.

SENATOR MOUNTJOY: Yeah. They kind of settled it; it went all the way and they won, and Canada then had to continue using it and they paid.

MS. BARNES: That's correct.

SENATOR MOUNTJOY: So aren't we in that same spot of vulnerability?

MS. BARNES: Well, in the MMT matter, it was a domestic Canadian court that actually resolved the issue prior to the WTO resolving the issue, and it was based on Canada's version of what the -- Canada's commerce clause, basically. The Canadian court, to my understanding, found that there was a discrimination basically on a commerce class basis within Canada between the different provinces and so the law was struck down on that basis by one of Canada's domestic courts. So that decision, that judgment, came out of the regular court system as opposed to the WTO system.

SENATOR HAYDEN: No, no! It was entirely because of the WTO challenge. It never would have happened and Canada coughed up--

MS. BARNES: It was about \$13 million.

SENATOR HAYDEN: Fourteen million dollars.

MS. BARNES: That's correct.

SENATOR MOUNTJOY: But it started out because of--

SENATOR HAYDEN: It started because of the WTO.

SENATOR MOUNTJOY: --NAFTA or WTO, but it ended up being settled by the--

MS. BARNES: Canadian courts. That was my understanding. If I've been misinformed, I'll certainly double check, but that was my understanding.

SENATOR MOUNTJOY: But the WTO triggered the action.

MS. BARNES: That's correct.

SENATOR HAYDEN: All right.

MS. BARNES: Thank you.

SENATOR HAYDEN: Thank you so much.

We will have another hearing before the 31st of August. Let's see if we can get the Attorney General's Office here and a number of other Administration officials.

Senator Mountjoy, if you or anyone else have suggestions as to who else to call for further testimony, that would be great.

I think we've established one fact, and that is that, you know, one office isolated from other offices in the Administration has been relating informally to the U.S. Trade Representative without the Legislature or even the other agencies in the loop, and that seems to me an abdication of public policy. It's more like informal networking and a belief that our economy is so strong that we'll just be fine.

Thank you very much.

--oo0oo--